No. 5688.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., a Corporation,

Appellant,

vs.

L. A. CLARK and ETTA CLARK, his wife,

Appellees.

BRIEF ON BEHALF OF APPELLANT.

SLOAN, HOLTON, MCKESSON & SCOTT,
Attorneys for Appellant.

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STATEMENT OF THE CASE.

This is an appeal from a judgment of the Distrist Court of the United States for the District of Arizona in favor of L. A. Clark and Etta Clark, his wife, and against the General Accident, Fire & Life Assurance Corporation, Ltd., a corporation, for $10,000.00 and costs, entered on August 28, 1928.

The action is based upon a judgment for $15,000.00 and costs alleged to have been recovered by Clark and his wife in the Superior Court of Yavapai County, Arizona, on the 9th day of November, 1927, against one George Ross. It is alleged in the complaint herein that said George Ross was on the 2nd day of July, 1927, duly licensed and permitted by the Arizona Corporation Commission, under the laws of said State, to carry on and conduct a taxi business in the city of Prescott, County of Yavapai, and vicinity, in said state, and owned, maintained, used and operated in connection therewith one certain Paige Sedan automobile. It is further alleged that in order to qualify for said license said Ross was required to and did obtain and file with the Arizona Corporation Commission a policy of indemnity insurance duly written and issued by the defendant in this action, and appellant herein, General Accident, Fire & Life Assurance Corporation, Ltd., by which policy defendant did insure and agree to indemnify said Ross against loss by reason of any liability imposed by law upon him for damages on account of bodily injuries suffered by any person by reason of the ownership, maintenance or use of a Paige Sedan automobile, described therein, and to defend in the name and on behalf of its assured, Ross, any suits brought against him on account of any such happenings.

It is further alleged in said complaint that in conformity with the orders of said Arizona Corporation Commission duly adopted and promulgated said defendant was required to and did attach to said policy of indemnity insurance a special rider or clause. The following is a copy of said rider referred to in the complaint:

"GENERAL ACCIDENT,
Fourth and Walnut Sts.
Philadelphia.

ARIZONA COMMON CARRIER
ENDORSEMENT

Not Valid Unless Countersigned by a Duly Authorized Representative of the Corporation.

In consideration of the premium at which this policy is written and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with Orders No. ....., it is understood and agreed that regardless of any of the conditions of this policy, same shall cover passengers as well as other persons, and shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the State, by any person, firm, association or corporation suffering any such loss or damage, if final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the Corporation shall pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, or the legal holder thereof, upon the demand of said plaintiff or holder thereof, whether the assured be or be not financially responsible in the amount of said judgment and that this policy may not be cancelled by either party except that written notice of the same shall have been previously given for at least ten days prior to the cancellation of such policy. PROVIDED, however, that no person suffering loss or damage,

either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve notice thereof upon the representative of the General Accident Fire and Life Assurance Corporation, Limited, at its office at Phoenix, Arizona.

It is further understood and agreed that this policy does not cover injuries or death to any employee of the assured, coming within the scope of the Workmen's Compulsory Compensation Law, Chapter 7, Title XIV, Revised Statutes of 1913; originally Chapter 14, Laws of 1912, special session and codified by Chapter 7, Laws of 1913, Fourth Session.

In all other respects the terms, limits and conditions of this policy remain unchanged.

Attached to and forming part of policy No. 574373 issued by the GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, to George Ross, Prescott, Arizona.

FREDERIC W .RICHARDSON,
United States Manager.

Countersigned at Phoenix, Arizona,
Date—February 5th, 1927.
THE STANDARD AGENCY, INC.
M. KINGSBURY, Agent."

Said complaint further alleges that on July 2d, 1927, at the City of Prescott, in said County and State, and while said policy was in full force and effect, said George Ross, the assured, while engaged

in the conduct of said taxi service business and while acting within the scope of his said license and permit, and while in an intoxicated condition drove said Paige Sedan automobile negligently, carelessly and in violation of the traffic rules and regulations of the State of Arizona and the City of Prescott, and crashed and collided with an automobile driven and operated by the plaintiffs, thereby inflicting upon plaintiffs, and each of them, grievous bodily injuries, and that the proximate cause of said accident and injuries to plaintiffs was the negligence and intoxication of said George Ross.

The complaint further alleges that thereafter the plaintiffs, L. A. Clark and Etta Clark, his wife, instituted an action in the Superior Court of Yavapai County, Arizona, being cause No. 10508 therein, against said George Ross to recover damages for and on account of said injuries suffered by plaintiffs as aforesaid in which said action appearance was entered in the name and on behalf of said George Ross by counsel employed by defendant, to-wit: Messrs. Sloan, Holton, McKesson and Scott, of Phoenix, Arizona, and that said counsel, together with other counsel employed by said George Ross, appeared for and represented said Ross throughout said suit; that said cause was tried by said Court with a jury and plaintifffffs recovered a judgment against said Ross for and on account of said bodily injuries alleged to have been suffered by plaintiffs, in the sum of Fifteen Thousand Dollars, together with their costs in said action.

Plaintiffs in their complaint further allege that said judgment recovered by them against said Ross in the Superior Court of Yavapai County, Arizona, is a final valid, subsisting and unsatisfied judgment, and that execution thereof has not been superseded and pray judgment against the General Accident, Fire & Life Assurance Corporation, Ltd., for the full amount thereof, viz., $15,196.35 and for their costs in this action.

Said judgment of the Superior Court of Yavapai County, Arizona, sued upon by plaintiffs herein, is based upon two verdicts returned by the jury in said cause, one being in favor of plaintiffs for $12,000 actual damages, and the other in their favor for $3,000 punitive damages.

Within the time prescribed by law after the recovery by the Clarks of their judgment in said Superior Court and before the bringing of the present action the defendant in said action, Ross, gave notive of appeal therefrom to the Supreme Court of Arizona and filed his bond to perfect said appeal. (See Defendant's Exhibits B, C, D, pages 81-89 Transcript Record.)

The General Accident, Fire & Life Assurance Corporation, Ltd., the defendant and appellant herein, appeared in the suit in Federal Court and filed a plea in abatement in which it alleged that if George Ross did obtain and file with the Arizona Corporation Commission the policy of insurance mentioned in the complaint and if said special rider or clause was attached as alleged, providing that

said policy should inure to the benefit of any and all persons suffering loss or damage, that all benefits conferred by said rider or clause upon persons suffering loss or damage were conditioned upon the recovery by said persons of a final judgment against the assured named in said policy, and that the right or benefit of any person or persons so injured was subject to all of the terms, conditions and agreements contained in said policy.

The defendant further alleged in its plea in abatement that if said L. A. Clark and wife instituted said action in said Superior Court, and if the same was tried and a judgment recovered against Ross as alleged by plaintiffs, that said judgment was not a final judgment as contemplated by the special rider so attached to said policy of insurance, or as contemplated by the rules and regulations of said Arizona Corporation Commission, or as contemplated by the laws of the State of Arizona in such case made and provided. Pleading further by way of abatement, the insurance company set up that if there was a judgment as alleged, that an appeal had been perfected therefrom and was then pending before the Supreme Court of the State of Arizona and that said judgment would not become final as contemplated by law and by said contract and rider and by the rules and regulations of the Arizona Corporation Commission until said appeal had been heard and the issues thereof determined by said Supreme Court. The defendant also demurred generally to the complaint.

Upon the hearing on the plea and abatement and demurrer the trial Court denied the plea, overruled the demurrer and summarily ordered judgment entered against defendant for $15,000. Said order for judgment was later on motion of defendant vacated as being contrary to the rules of court regarding amendments and defendant given leave to answer herein. Defendant demurred generally to the complaint and also filed its answer. Thereafter and a few days before the trial defendant tendered and filed its Amended Demurrer and Answer, in which, in addition to admitting and denying certain allegations of the complaint, defendant alleged that the limit of its liability expressed in said policy issued to said George Ross was the sum of Five Thousand Dollars for bodily injuries or death to any one person. Further answering the complaint the defendant set out verbatim the clause or rider attached to the policy in conformity with the order of the Arizona Corporation Commission, and heretofore set forth in the Statement of the Case, and plead that defendant had received no written notice from the plaintiffs, or either of them, within twenty days from the date of suffering said loss or damage, if any, as provided in said indorsement, or at all, claiming any loss or damage under said policy or any policy issued by defendant.

In its said amended answer the defendant further alleged that said policy of insurance contained among others, the following provision:

> "STATEMENT 8. Regardless of the number of the Assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00) and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00)."

and that under said provision the limit of liability of defendant to any person for injuries sustained arising out of any one accident is the sum of Five Thousand Dollars, and further plead as to whether the plaintiffs herein, or either of them, were injured in an accident occasioned by the automobile covered by said policy, or the extent or amount of injuries, if any, to said plaintiffs, or either of them, defendant was without information upon which to base a belief and therefore denied that plaintiffs, or either of them, were injured in any accident covered by said policy. Leave to file said Amended Answer was, however, refused by the Court for the grounds stated in the Bill of Exceptions.

The case was tried at Prescott, Arizona, on August 18, 1928, before the Honorable F. C. Jacobs, Judge presiding without a jury, a written stipulation waiving jury having been entered into by the parties and filed. (Transcript of Record, p. 32). At the conclusion of the trial the case was taken under advisement and on August 28, 1928, the

Court ordered judgment in favor of the plaintiffs against the defendant in the sum of $10,000 and costs. From said judgment the defendant has appealed to this Court.

ASSIGNMENT OF ERRORS.
FIRST.

The Court erred in overruling and denying defendant's Plea in Abatement herein upon the grounds and for the reasons following, to-wit:

That the complaint seeks to enforce as against the defendant herein under the indemnity clause of a certain policy of indemnity insurance issued to one George Ross, defendant in an action in the Superior Court of Yavapai County, Arizona, a judgment alleged to have been rendered and entered therein in the amount of $15,000 against said Ross for damages arising out of an automobile accident in which the automobile alleged to have been covered by said insurance policy was involved. That the right of the plaintiffs to claim under said insurance policy arises solely out of a special rider or clause attached to said policy providing that said policy should inure to the benefit of any and all persons suffering loss or damage, which right was under the terms of said clause, conditioned upon the recovery by said person of a final judgment against the person assured in said policy of indemnity insurance, namely George Ross.

If judgment was recovered against Ross as alleged in plaintiffs' complaint, nevertheless the de-

fendant contends that such judgment has not become a final judgment as contemplated by the clause or rider attached to said policy. The defendant set up in its plea in abatement and proved that from the judgment of the Superior Court of Yavapai County, Arizona, an appeal to the Supreme Court of the State of Arizona had been duly and regularly perfected and was at the time of the trial of said Plea in Abatement pending in said Supreme Court. Defendant contends that the purport and intent of the special rider or clause attached to the indemnity insurance policy is that in the event the injured person shall have recovered a final judgment in which all of the issues of the case have been finally and conclusively adjudicated, then and in that event only may such injured claim the benefit of the indemnity clause in said insurance policy and avail himself thereof. That the Court should, upon the proof of the pendency of said appeal, have granted the plea in abatement abating and staying this action until a final determination of the issues involved in said appeal pending before said Supreme Court of the State of Arizona, and erred in refusing so to do.

SECOND.

The Court erred in refusing defendant leave to file its Amended Demurrer and Answer, which said Amended Demurrer and Answer did, in addition to the defenses set up in the original demurrer and answer, demurred to the complaint upon the ground that there were several causes of action improperly

united, and did set up in said Amended Answer, in addition to the defenses set up in the original answer, the following defenses:

"I.

That the policy of insurance herein referred to contained, among other things, the following provision:

'GENERAL ACCIDENT
Fourth and Walnut Sts.
Philadelphia.

ARIZONA COMMON CARRIER
ENDORSEMENT
Not Valid Unless Countersigned
by a Duly Authorized Representative of the Corporation.

In consideration of the premium at which this policy is written and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with Orders No. ....., it is understood and agreed that regardless of any of the conditions of this policy, same shall cover passengers as well as other persons, and shall inure to the benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the State, by any person, firm, association or corporation suffering any such loss or damage, if final judgment is rendered against the assured by reason of any loss or claim covered by this policy, the Corporation shall

pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, or the legal holder thereof, upon the demand of said plaintiff or holder thereof, whether the assured be or be not financially responsible in the amount of said judgment and that this policy may not be cancelled by either party except that written notice of the same shall have been previously given for at leasat ten days prior to the cancellation of such policy . PROVIDED, however, that no person suffering loss or damage, either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve written notice thereof upon the representative of the General Accident, Fire & Life Assurance Corporation, Limited, at its office at Phoenix, Arizona.

It is further understood and agreed that this policy does not cover injuries or death to any employee of the assured, coming within the scope of the Workmen's Compulsory Compensation Law, Chapter 7, Title XIV, Revised Statutes of 1913; originally Chapter 14, Laws of 1912, special session and codified by Chapter 7, Laws of 1913, Fourth Session.

In all other respects the terms, limits and conditions of this policy remain unchanged.

Attached to and forming part of Policy No. 574373 issued to the GENERAL

ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, to George Ross, Prescott, Arizona.

Countersigned at Phoenix, Arizona.

Date—February 5th, 1927.

THE STANDARD AGENCY, INC.
M. Kingbury, Agent.
FREDERIC W. RICHARDSON,
United States Manager.

II.

That this defendant has received no written notice from the plaintiffs, or either of them, within twenty days from the date of suffering said loss or damage, if any, as is provided in said indorsement, or at all, claiming any loss or damage under said policy or any policy issued by this defendant.

As a further and separate defense to said action defendant alleges:

I.

That said policy of insurance heretofore referred to contained, among others, the following provision:

'STATEMENT 8: Regardless of the number of the assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00), and, subject to the same limit for each person, the Corporation's total liability for loss from

any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00).'

II.

That under said provision the limit of liability of this defendant to any person for injuries sustained arising out of any one accident is the sum of Five Thousand Dollars ($5,000.00). As to whether the plaintiffs herein, or either of them, were injured in an accident occasioned by the automobile covered by said policy of insurance herein referred to, or the extent or amount of injuries, if any, to said plaintiffs, or either of them, this defendant is without information upon which to base a belief and therefore denies that said plaintiffs or either of them, were injured in any accident covered by said policy herein referred to."

The defendant charges error upon the following grounds and for the following reasons, to-wit: For the reason that said Amended Demurrer and Answer set up grounds of demurrer and matters of defense not contained in said original demurrer and answer. That by refusing to permit the filing of said amended Demurrer and Answer the defendant was deprived of a substantial right.

THIRD.

The Court erred in receiving in evidence Plaintiffs' Exhibit No. 1, said Exhibit purporting to be a copy of the printed Abstract of Record in the Su-

preme Court of the State of Arizona in the appeal of cause No. 10580 from the Superior Court of the County of Yavapai, State of Arizona, over the objection of defendant that the same was incompetent, irrelevant and immaterial and did not contain the original nor any copy of the pleadings or judgment in said cause No. 10580, certified to under the hand and seal of the lawful possessor of such records as required by the statutes of the State of Arizona as a prerequisite to their admission as evidence of the contents thereof, and that said Exhibit 1 was not the best evidence or any competent evidence of the matters and things attempted to be shown thereby and did not conform to the law with reference to the manner and mode of proving official documents and court records within the State of Arizona. Defendant assigns the foregoing as error for the following reasons and upon the following grounds, to-wit: That the proof of the judgment and pleadings in said cause No. 10580 was essential to a recovery in the caase at bar and that said instrument so admitted in evidence did not constitute any proof thereof.

FOURTH.

The Court erred in receiving in evidence over the objection of the defendant, a policy of insurance written by the General Accident, Fire & Life Assurance Corporation, designated as "Plaintiffs' Exhibit No. 2," which said policy of insurance did by its terms agree to indemnify one George Ross, of

the Town of Prescott, County of Yavapai, State of Arizona, for the period beginning February 5, 1927, and ending December 31, 1927, on account of damages sustained by persons other than employees by reason of the ownership, maintenance or use of one certain automobile alleged to be owned by said Ross, known as a Paige 5 Passenger, 6 Cylinder Sedan, built in the year 1926, Motor No. 417333, Serial No. 409495, for the reason that no proper foundation had been laid for the reception of said document in evidence in that it had not been shown that the automobile described in said policy was the automobile referred to in plaintiffs' complaint.

FIFTH.

The Court erred in receiving in evidence upon the trial an instrument designated "Plaintiffs' Exhibit No. 3" over the objection of the defendant, which said instrument was in words and figures as follows, to-wit:

"July 7th, 1927.

Mr. B. F. Hunter,
C/o Standard Accident Ins. Co.,
Phoenix, Arizona.
Dear Mr. Hunter:—

I have further investigated the Clark-Ross automobile collision, and Mrs. Clark is really in a bad way. There were reports current on the street last night that she had died, but this, I find this morning, to be untrue. However, she is running a very high temperature, with

frequent hemorrhages, and it is quite apparent that she is going to have a bad time of it.

They had very high opinions as to what they should recover and want me to file suit for Fifteen Thousand Dollars. I believe there is a better chance to settle now than any other time because the woman is seriously ill. She is really in bad shape from her disease, as well as the accident. I believe if you will make me a firm offer of Twenty Five Hundred Dollars ($2500.00) I can get a settlement out of them, for both. This not to include anything for the automobile,—simply to cover the personal injury to Clark and Mrs. Clark, their doctor and medical attendants. This is the very best that I can possibly hope to do, and if we cannot get together on that basis, as reluctant as I am to bring suit against you, I will have to file suit against Ross for the Fifteen Thousand Dollars, and I think the chances of getting a substantial verdict against him is very good.

Please let me know at your early convenience,

Very truly yours,

ANDERSON & GALE.

By

LA-c

Plts Exhibit No. 3
Marked for Identification Only
Case No. Law 272 Pct.
Pltfs. Exhibit No. 3
Admitted and filed Aug 20 1928
C. R. McFall, Clerk
By Paul Dickason
Chief Deputy Clerk
Case No, Law 272 Prescott
Clark v. General Accident."

Error is assigned upon the admission of the foregoing instrument in evidence upon the ground and for the reasons following to-wit: That said letter did not show or purport to show that B. F. Hunter was an accredited agent, or any agent of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon herein and that said letter did not constitute notice to defendant company as provided by the terms of said policy and was, therefore, incompetent, irrelevant and immaterial.

SIXTH.

That the Court erred in receiving in evidence upon the trial hereof, as Plaintiffs' Exhibit No. 4, over the objection of the defendant, the following letter:

"THE STANDARD AGENCY, INC.
formerly Carl H. Anderson Insurance Agency
General Agents
INSURANCE AND SURETY BONDS
Phoenix, Arizona

Fire	Workmen's
Atomobile	Compensation
Public Liability	Accident
Plate Glass	and Health
Burglary	Fidelity and
Elevator	Surety Bonds

July 11, 1927

Adams Hotel Bldg. 16 E. Adams St.
Telephone 23101.

Mr. Leroy Anderson
Prescott, Arizona.

Dear Mr. Anderson: Re: Clark-Ross Collision

Thanks for your prompt letter of the 7th inst. with reference to the above matter. We note, with regret, that Mrs. Clark is running a high temperature and has frequent hemorrhages, but wonder whether these conditions are attributable to the accident and whether they did not exist even prior to the accident.

We sincerely trust that the suit referred to by you will be withheld, at least until we have had an opportunity to perhaps more fully acquaint ourselves with her present condition and to what extent her present condition is attributable to the accident. We note that you are inclined to be entirely reasonable in the matter, but we do feel from the information at present in hand, that $2500 would be out of proportion to the injury. May we ask your consent to communicating with Dr. Flynn for a full and

complete report along the above lines, when we will likely be in a position to advise further concerning the $2500 offer.

Yours very truly,
STANDARD AGENCY, INC.
By B. F. Hunter.
B. F. HUNTER, Adjuster.

BFH:PW
Pltfs Exhibit No. 4
Marked for Identification Only
Case No. Law 272 Pct.
Pltfs Exhibit No. 4
Admitted and Filed Aug 20, 1928
C. R. McFALL, Clerk
By Paul Dickason
Chief Deputy Clerk
Case No. Law 272 Pct.
Clark v. General Accident."

Error is charged upon the reception of said letter in evidence upon the following grounds and for the following reasons, to-wit: That said letter did not show or purport to show that the said B. F. Hunter was an accredited agent or representative, or any agent or representative of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon, aand that no evidence whatever had been introduced by plaintiff that said B. F. Hunter was in truth and in fact an agent of the defendant corporation authorized to represent or bind said defendant corporation in any manner whatsoever, and that said letter was wholly irrelevant and immaterial and

was not competent evidence of any fact material to the issues of this case.

SEVENTH.

The Court erred in denying defendant's motion made at the close of plaintiffs' case to strike Plaintiffs' Exhibit No. 1, said Exhibit purporting to be a copy of the printed Abstract of Record in the Supreme Court of the State of Arizona in the appeal of cause No. 10580 from the Superior Court, County of Yavapai, State of Arizona. Error is charged upon the following grounds and for the following reasons, to-wit: That the offer of said Exhibit was for the avowed purpose of proving the judgment and pleadings in cause No. 10580 in the Superior Court of the County of Yavapai, State of Arizona. That said Exhibit was not nor did it purport to be a true copy of said pleadings and judgment, certified to by the officer having the custody and charge thereof. That said Exhibit did not constitute competent evidence tending to prove or disprove any issue in this case.

EIGHTH.

The Court erred in overruling defendant's demurrer to the evidence at the close of plaintiffs' case, that is to say, defendant's demurrer that the evidence and all of it introduced by plaintiffs in support of their complaint failed to prove facts sufficient to entitle the plaintiffs to a judgment under their complaint. The defendant charges that

such ruling was erroneous for the following reasons and upon the following grounds, to-wit: That the evidence at the close of plaintiffs' case wholly failed to show that the automobile concerned in the accident complained of in said cause No. 10580 was the identical automobile designated and described in the policy of insurance sued upon in this action. That the evidence at the close of plaintiffs' case wholly failed to show the performance of the condition named in the rider or endorsement upon the insurance policy sued upon, that is to say, that the person suffering loss or damage in order to avail himself of the benefits of said policy and endorsements thereon, should within twenty days from the date of suffering said loss or damage serve written notice thereof upon the representative of the General Accident, Fire & Life Assurance Corporation, Ltd., at its office at Phoenix, Arizona. That there was wholly lacking in the evidence any proof of the performance of the condition above set forth.

NINTH.

The Court erred in overruling defendant's demurrer made at the close of plaintiffs' case that it appeared from the evidence that there were two causes of action improperly united in the complaint. Error therein is charged upon the following grounds and for the following reasons, to-wit: That the policy of insurance sued upon herein in express language provided as follows:

"STATEMENT 8: Regardless of the number of the assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00), and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00)."

That it appeared from the evidence that the plaintiffs were claiming in one cause of action damages for personal injuries to two separate persons, namely, L. A. Clark and Etta Clark, his wife. That under the foregoing facts there were two causes of action improperly united in a single cause of action.

TENTH.

The Court erred in denying defendant's motion made at the close of plaintiffs' case for judgment in favor of the defendant and against the plaintiffs. Error is predicated therein upon the following grounds and for the following reasons, to-wit: The evidence at that stage of the case failed to show what, if any, amount each of the plaintiffs was entitled to recover. The injuries complained of were not shown to have been caused by the automobile described in the policy of insurance sued upon in this action. That two causes of action were improperly united in that the policy of insurance

introduced in evidence did not give the right to plaintiffs to recover jointly but limited each to the amount of his or her injury, but not to exceed Five Thousand Dollars ($5,000.00) each, and there was no showing as to what damages were sustained by each of said plaintiffs. That the plaintiffs wholly failed to establish by the evidence the facts necessary to entitle them to recover under the terms of the policy upon which they were suing.

ELEVENTH.

That the Court erred in sustaining the objection of counsel for plaintiffs to the following question asked of defendant's witness J. E. Russell, concerning certain statements alleged to have been made by LeRoy Anderson, counsel for plaintiffs, in his argument to the jury in cause No. 10580 in the Superior Court of Yavapai County, Arizona:

> BY MR. HOLTON:
>
> Q. I will ask you whether you recall Mr. Anderson, attorney for the plaintiffs, making any statement in his argument to the jury with respect to the amount of damages for Mr. Clark? To the best of your recollection will you testify and tell the Court what that statement was?

Error is predicated upon the following grounds and for the following reasons, to-wit: That counsel for the defendant did, following such question, avow that he intended to prove by the witness Russell

that Mr. Anderson, attorney for the plaintiffs in cause No. 10580 in the Superior Court of Yavapai County, Arizona, in his argument to the jury, said in substance, that he was claiming no damages on behalf of Mr. Clark in that action. That defendant, as throwing light upon the right of the Court to allow damages for personal injuries to L. A. Clark under the policy of insurance sued upon herein, had a right to show that no claim was made in said cause No. 10580 for such damages and that if the plaintiff L. A. Clark was injured in any manner whatsoever the plaintiffs by their counsel waived any such damages and that, as a matter of fact, no damages were awarded in said cause No. 10580 on account of personal injuries received by L. A. Clark.

TWELFTH.

The Court erred in sustaining the objection of counsel for plaintiffs to the following question asked of the defendant's witness C. R. Holton; concerning what statements were made by LeRoy Anderson, counsel for plaintiffs, in his argument to the jury in said cause No. 10580 in the Superior Court of Yavapai County, Arizona:

BY MR. SCOTT:

Q. What did he (Anderson) say with respect to the amount of damages claimed by Mr. Clark?

Error is predicated upon the following grounds and for the following reasons: That counsel for the defendant did avow at the time of the propounding of said question, that he intended to prove by said witness that Mr. Anderson, counsel for the plaintiffs in cause No. 10580, in his argument to the jury said in substance that he was not asking for any damages for any injuries sustained by L. A. Clark in the accident concerned in said cause. That defendant had a right to show that if L. A. Clark sustained any injuries whatsoever in the accident complained of in said cause No. 10580, that he was not asking for any damages therefor and that by the statement of his counsel made in the argument of said cause, he waived any such damages.

THIRTEENTH.

The Court erred in overruling defendants' demurrer to the evidence at the close of the case upon the ground that said evidence wholly failed to entitle plaintiffs to recover in this action. Error is predicated upon said ruling upon the grounds and for the reasons following: That the evidence in the case wholly failed to show that the automobile concerned in the accident complained of in cause No. 10580 was the identical automobile designated and described in the policy of insurance sued upon in this action. That said evidence wholly failed to show the performance of the condition named in the rider or endorsement upon the insurance policy

sued upon, that is to say, that the person suffering loss or damage, in order to avail himself of the benefits of said policy and endorsements thereon, should within twenty days from the date of suffering said loss or damage, serve written notice thereof upon the representative of the General Accident, Fire & Life Assurance Corporation, Ltd., at its office at Phoenix, Arizona. That there was wholly lacking in the evidence any proof of the performance of the condition above set forth. That the evidence wholly failed to show what, if any, personal injury was received by plaintiffs or either of them.

FOURTEENTH.

The Court erred in overruling defendant's demurrer at the close of the case that it appeared from the evidence that there were two causes of action improperly united in the complaint. Error therein is charged upon the following grounds and for the following reasons, to-wit: That the policy of insurance sued upon herein in express language provided as follows:

> "STATEMENT 8: Regardless of the number of the Assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.-00), and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily in-

juries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000.00)."

That it appeared from the evidence that the plaintiffs were claiming in one cause of action damages for personal injuries to two separate persons, namely, L. A. Clark and Etta Clark, his wife. That under the foregoing facts there were two causes of action improperly united in a single cause of action.

FIFTEENTH.

The Court erred in denying defendant's motion made at the close of the entire case for judgment in favor of the defendant and against the plaintiffs. Error is predicated upon the following grounds and for the following reasons, to-wit: The evidence at that stage of the case failed to show what, if any, amount each of the plaintiffs was entitled to recover. The injuries complained of were not shown to have been caused by the automobile described in the policy of insurance sued upon in this action. That two causes of action were improperly united in that the policy of insurance introduced in evidence did not give the right to plaintiffs to recover jointly but limited each to the amount of his or her injury, but not to exceed Five Thousand Dollars ($5,000.00), each, and there was no showing as to what damages were sustained by each of said plaintiffs. That the plaintiffs wholly failed to establish by the evidence the

facts necessary to entile them to recover under the terms of the policy upon which they were suing.

ARGUMENT.

FIRST ASSIGNMENT OF ERROR.

Appellant's first Assignment of Error charges error on the part of the trial court in denying its Plea in Abatement setting up the pendency of the appeal from the judgment of the Superior Court of Yavapai County in favor of the Clarks and against George Ross. The rider or clause attached to the policy issued by the defendant company to Ross under which plaintiffs are claiming, is again set out for the convenience of the Court in connection with this Assignment:

"GENERAL ACCIDENT
Fourth and Walnut Sts.
Philadelphia.

ARIZONA COMMON CARRIER
ENDORSEMENT

Not Valid Unless Countersigned by a Duly Authorized Representative of the Corporation.

In consideration of the premium at which this policy is written and in further consideration of the acceptance by the Arizona Corporation Commission of this policy as a compliance with Orders No....., it is understood and agreed that regardless of any of the conditions of this policy, same shall cover passengers as well as other persons, and shall inure to the

benefit of any or all persons suffering loss or damage, and suit may be brought thereon in any court of competent jurisdiction within the State, by any person, firm, association or corporation suffering any such loss or damage, *if final judgment is rendered against the assured* by reason of any loss or claim covered by this policy, the Corporation shall pay said judgment up to the limits expressed in the policy direct to the plaintiff securing said judgment, or the legal holder thereof, upon the demand of said plaintiff or holder thereof, whether the assured be or be not financially responsible in the amount of said judgment and that this policy may not be cancelled by either party except that written notice of the same shall have been previously given for at least ten days prior to the cancellation of such policy. PROVIDED, however, that no person suffering loss or damage, either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve written notice thereof upon the representative of the General Accident Fire and Life Assurance Corporation, Limited, at its office at Phoenix, Arizona.

It is further understood and agreed that this policy does not cover injuries or death to any employee of the assured, coming within the scope of the Workmen's Compulsory Compensation Law, Chapter 7, Title XIV, Revised Statutes of 1913; originally Chapter 14, Laws of 1912, special session and codified by Chapter 7, Laws of 1913, Fourth Session.

In all other respects the terms, limits and conditions of this policy remain unchanged.

Attached to and forming part of policy No. 574373 issued by the GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, of Perth, Scotland, to George Ross, Prescott, Arizona.

FREDERIC W. RICHARDSON,
United States Manager.

Countersigned at Phoenix, Arizona,
Date—February 5th, 1927.
THE STANDARD AGENCY, INC.
M. KINGSBURY, Agent."
(Italics ours)

It will be noted that any right or benefit sought to be asserted by an injured person under the clause or rider just set forth is dependent entirely upon the condition "if final judgment is rendered against the assured by reason of any loss or claim covered by this policy."

It was the contention of defendant in the court below, and we believe it to be the law, that a "final judgment means the final settling of the rights of the parties to the action beyond all appeal.

Dean v. Marshall, 35 N. Y. S. 724;
Blanding v. Sayles, 49 Atl. 992;
Bixler's Appeal, 59 Cal. 550;
Annis v. Bell, 64 Pac. 11.

In the absence of some statutory provision, no proceedings dependent on a judgment of the court can be taken until final adjudication, which means

determination by the last court whose jurisdiction has been legally invoked.

Wallace v. Adams, 243 S. W. 572.

The case of Fidelity & Causalty Co. v. Fordyce, 41 S. W. 420, is exactly in point here and for that reason we quote at length the decision of the Court:

> "BATTLE, J. Two actions were commenced by S. W. Fordyce and Allen N. Johnson, receivers of the City Electric Street Raiilway, against the Fidelity & Causalty Company and the Union Guaranty & Trust Company (which were afterwards, by consent, consolidated and heard as one action) on a policy executed by the Fidelity & Causalty Company to the City Electric Street Railway Company, to recover the amounts of judgments rendered against the street railway company for damages resulting from personal injuries caused by the operation of its railway between the 9th of December, 1891, and the 9th of December, 1892. The portions of the policy upon which these actions were based, and which affect plaintiff's right of recovery, are as follows:
>
> > 'It is hereby agreed as follows: That the company (the Fidelity and Casualty Company) will pay to the insured (the City Electric Street Railway Company) or their legal representatives any and all such sums as the insured may become liable for in damages in consequence of bodily injuries suffered by any person or persons whomsoever while traveling on the railroad

of the insured, or otherwise, in connection with the operation of said road, during the period covered by the premium paid; that is to say, between the ninth day of December, 1891, and the ninth day of December, 1892, at noon, or by any renewal premium.

'(1) The company's liability for a casualty resulting in injuries to or death by any one person is limited to fifteen hundred dollars, and, subject to the same limitation for each person, their gross liability for several persons injured or killed in any one casualty is ten thousand dollars.

'(2) If any legal proceedings are taken against the insured by any person or persons injured as aforesaid to enforce a claim for indemnity for such injuries, then the company (the Fidelity and Casualty Company) shall, at their own cost and expense, have the absolute control of defending the same throughout in the name and on behalf of the insured; but, if the company shall offer to pay the insured the full amount insured, then they shall not be bound to defend the case, nor be liable for any costs or expenses which the insured may incur in defending such case.

'Provided, always, that this policy is subject to the condition and agreements indorsed hereon, which are made part of this contract,' a part of which is as follows:

'(1) Upon the occurrence of an accident in respect to which a claim may arise, notice thereof shall be immediately given

by the insured to the company at their office in New York, and to whomsoever shall have countersigned their policy. The insured shall also furnish the company full information in relation to the accident.

'(2) On receiving from the insured notice of any claim, the company may take upon themselves the settlement of the same, and in that case the insured shall give all reasonable information and assistance necessary for that purpose. The insured shall not, except at his own cost, settle any claim or incur any expense without the consent of the company.'

The defendants answered, and admitted the execution of the policy, but 'denied that it agreed to pay all sums for which the railroad company might be liable, and averred that the Fidelity & Casualty Company only agreed to indemnify and reimburse the said railway company for any and all sums it might pay on account of said injuries, not exceeding fifteen hundred dollars in any one case.

'They admitted the judgments set up in the complaints but averred that the Fidelity & Casualty Company was not liable to pay the same, because the City Electric Street Railway Company had not paid them, but only paid money into the registry of the United States court, and was not damaged by such deposit, within the meaning of the policy of insurance.

'They denied the liability of the Fidelity & Casualty Company, because it had the

right to control the litigation, and was then contesting the liability of the railway company in the supreme court, and such suits had not been determined by the said supreme court,'

The issues were tried by the court, sitting as a jury, upon the pleadings, exhibits, and an agreed statement of facts, a part of which is as follows:

'It is agreed between the parties to this case that on the 12th day of July, 1892, one Arthur Connery received personal injuries, on account of which he brought suit against the City Electric Street Railway Company for damages which were alleged to have been occasioned in the operation of the road of said railway company in Little Rock.

'That on the same day one Russell Yates received injuries by being burned by a telephone wire which was alleged to have been in contact with a live trolley wire of the said street railway company in said city, to recover damages for which he brought suit against the said street railway company.

'That on the 30th day of October, 1892, one W. H. H. Riley was injured by being run over by a car of the said railway company in said city, on account of which he instituted an action against the said street railway company.

'On the 15th day of February, 1892, one Lawrence Levy was run over and killed by the cars of the street railway company

in said city, and the administrator of said estate brought suit to recover damages occasioned to the next to kin, and also to the estate of said Lawrence Levy, by reason of said killing.

'That on the ..... day of April, 1892, one S. W. Davies was injured while alighting from the cars of the said street railway company in said city, and to recover the damages occasioned thereby he brought suit against the street railway company.

'The notice of the bringing of each of said suits was duly given to the Fidelity & Casualty Company, and it appeared to each suit by its attorney, and defended the same.

'That such proceedings were had in the case of Arthur Connery on the 9th day of December, 1892, that judgment was duly rendered in his favor for the sum of $300, to bear interest from date at the rate of six per cent. per annum, and for $37.60 costs therein expended.

'That in the action of Peter Yates a judgment was on the 3d day of June, 1893, rendered for the sum of $1,000 with interest from date at six per cent., and $28.05 costs.

'That in the case of W. H. H. Riley a judgment was on the 3d day of April, 1894, rendered for $5,000, with interest from date at six per cent. per annum, and the sum of $33.95 costs of suit.

'That in the case instituted by Kaufman Levy a judgment was on the 28th day of

May, 1892, rendered for plaintiffs for $1,500, with interest from date at six per cent. per annum, and for costs amounting to $57.95.

'That in the case of S. W. Davies a judgment was rendered on the 7th day of December, 1894, for $100, with interest from date at six per cent. per annum, and costs amounting to $14.75.

'That in the cases of Arthur Connery and Peter Yates appeals were taken to the supreme court of the state, without supersedeas, which are now pending there.

'That, in the cases brought by Kaufman Levy and W. H. H. Riley, appeals were likewise taken to the supreme court, which have been heard, and the judgments of the circuit court have been affirmed.

'That in the case of S. W. Davies no appeal was taken.

Upon this statement of facts the defendant asked declarations of law to the same effect as they answered, but the court refused to so declare, but declared as follows:

'The court declares the law on these facts in favor of the plaintiff. The several judgments are prima facie evidence of the liability of the plaintiff, and the defendant company's obligation is to pay all such sums as the insured may become liable for in damages. Their obligation, therefore, attaches as soon as the judgments are recovered. The plaintiffs are entitled to judgment for the amounts set forth, subject to the limitations of the bond;' and rendered

judgment against the defendants for $5,113.80.

The defendants endeavored to defeat a recovery by the plaintiff in this action upon two grounds: (1) The railway company had not paid the judgments recovered against it; and (2) because appeals from the judgments of the circuit court to the supreme court in two or more of the cases were pending. The question for our decision is, are these grounds tenable?

According to the terms of the policy, the insurance company, which was the Fidelity & Casualty Company, undertook to pay all such sums as the railway company should become liable for in damages in consequence of bodily injuries caused by the operation of its street railway. Upon the occurrence of an accident in respect to which a claim for damages might have arisen, notice was required to be immediately given by the railway company to the insurance company. The former was forbidden to settle such claim or incur any expense without the consent of the latter company. The insurance company assumed the liability for such a claim, and had authority to settle it without litigation. If any legal proceedings were instituted against the railway company to enforce it, the insurance company bound itself to take absolute care and control of defending against the same in the name and in behalf of the assured. In only one way could it have absolved itself from this obligation, and that was by paying or offering to pay the assured the full amount for which it was liable in such cases by its policy. According to these terms,

the ascertainment and adjustment of the liability of the insured for claims for damages depended on the insurance company, provided it acted in good faith. The assured surrendered the entire control and management thereof to the insurer. So long as the latter resisted in the courts the enforcement of such claims, no right of action accrued upon its policy; for until the termination of the litigation both parties to the policy denied the liability of the assured, and the existence and extent thereof remained undetermined according to the methods by which the parties, in effect, agreed it should be ascertained and fixed. Any other interpretation of the policy would take from the insurer the protection for which it contracted.

In short, our conclusion in this case is that, when the amount of the liability of the railway company for damages in consequence of bodily injuries caused by the operation of its railway was determined, the Fidelity & Casualty Company became bound by its policy to pay so much thereof as does not exceed the sum it agreed to pay in such cases, although it was not paid by the assured (Insurance Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051), but that the same was not determined so long as the action therefor was pending in court, or an appeal from the judgment thereon, was pending in the supreme court.

So much, therefore, of the judgment in this action as embraces the amounts recovered for injuries received by W. H. H. Riley, Lawrence Levy, and S. W. Davies, and costs of the re-

covery, is affirmed; and as to the remainder it is reversed, and the action therefor is dismissed, without prejudice."

We feel that the case of Schroeder v. Columbia Casualty Co., 213 N.Y.S. 649, is also squarely in point on this proposition. There the Court said:

"The gist of the defense interposed by the defendant is that an appeal has been taken from the judgment, which is still undetermined; that such an appeal is being diligently prosecuted, and that liability 'imposed by law' will not become fixed until termination of such appeal. It contains no allegations that execution had not been returned unsatisfied, or that the judgment debtor is solvent. On the contrary, I am satisfied, from the proof submitted by the plaintiff, that the insolvency of the judgment debtor has been established, and that the return of execution unsatisfied was by reason of such insolvency. It further appears, without dispute, that the defendant has filed no bond to stay execution but has otherwise perfected the appeal. In these circumstances the plaintiff argues that she has established her right to maintain this action, that the defense interposed is without merit, and that the defendant's liability at this time is fully established.

"With this contention of the plaintiff I cannot agree. Under the policy the insured was required to co-operate with the company in the defense of the action and in any appeal. In such circumstances, the insured, had it been

solvent, would not, I think, be permitted to refuse to co-operate in the appeal, but instead pay the judgment and bring action at this time against the defendant. In the circumstances I do not see how the plaintiff in this action can claim greater rights than the assured would have. Roth v. National Automobile Mutual Casualty Co., 202 App. Div. 667, 195 N. Y. S. 865; Schoenfield v. New Jersey Fidelity & Plate Glass Ins. Co., 203 App. Div. 796, 197 N. Y. S. 606. On the appeal the judgment now sought to be enforced may be reversed. If such were the outcome of the appeal, the defendant might find itself without recourse against a plaintiff financially irresponsible.

"My conclusion is that the 'liability imposed by law,' provided for in the policy, has not yet been fixed, and will not be so fixed until all appeals the defendant sees fit to take have been finally determined."

Under its policy issued to George Ross the appellant agreed, as did the casualty company in the case last cited, "To Indemnify the Assured, named and described in Statement 1 of the Declarations forming part hereof (George Ross), against loss by reason of the liability imposed by law upon the Assured for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered" while the policy was in effect by reason of the ownership, maintenance or use of the automobile therein described.

In this regard we particularly call attention to the decision of this Court in Wolf v. District Court

in and for the Northern District of California, Second Division, 235 Fed. 69, wherein it was said (Judge HUNT writing the opinion):

> "It appears that the Supreme Court of the state of California has not yet acted upon an appeal in case No. 50811 taken from the judgment of the lower state tribunals, and inasmuch as that court will apparently be called upon to decide the issues tried in the action to quiet title, it is clear to us that the federal court ought, at least at this time, to decline to proceed with the case before it. By proceeding in the federal court a judgment might be rendered which would be in conflict with the one rendered by the state court, and create that confusion deprecated by the Supreme Court where attempts have been made to transfer matters standing for judgment in the one court to the other."

We submit that the District Court erred in overruling the plea in abatement and in refusing to stay proceedings in the cause in the Federal court until a determination had been had of the appeal then pending in the Supreme Court of Arizona.

It may be just as well at this point to announce that the Supreme Court of the State of Arizona on February 12, 1929, rendered its decision in the appeal from the judgment here sued upon, whereby the plaintiffs in that case, appellees here, were given the option of remitting a portion of the judgment or the case would by the order of such

Supreme Court be reversed and remanded for a new trial; also that the plaintiffs filed the remittitur suggested by the Supreme Court and the original judgment upon which plaintiffs brought this suit is now dead and a new and different judgment has been rendered and entered by the Superior Court which gave the original judgment sued upon. In view of the foregoing action of the Arizona Supreme Court and its mandate issued to the lower court, the judgment of the District Court in this case has been rendered nugatory. We will in more detail discuss the decision of that Court and its effect upon this case in a subsequent assignment.

We think the principle enunciated by Mr. Justice Matthews in Covell v. Heyman, 111 U. S. 182, 4 Sup. Ct. 358, 28 L. Ed. 390, is applicable here:

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience."

We submit that in matters of concurrent jurisdiction the court to which jurisdiction first attaches

holds the case to the exclusion of the other until the final determination of the matters in dispute.

Pickens v. Roy,
187 U. S. 177,
23 S. Ct. 78,
47 L. Ed. 128,
affirming Pickens v. Dent,
106 Fed. 653,
45 C.C.A. 522.

We quote the following from Pickens v. Dent, supra, which was affirmed by the Supreme Court of the United States:

> "The course to be pursued has been well defined in cases in which there is a conflict as to jurisdiction between the state and federal courts. Briefly stated, the rule is this: Considering the peculiar character of our government, and keeping in view the forbearance which courts of co-ordinate jurisdiction exercise towards each other, it follows that the court which first obtains rightful jurisdiction over the subject-matter of a controversy must by all other courts be permitted to proceed therein to final judgment. The federal courts will not interfere with the administration of affairs lawfully in the custody and jurisdiction of a state court, nor will they permit the courts of the states to interfere concerning litigation rightfully submitted to the decision of the courts of the United States."

We respectfully contend that upon the introduction of proof of the pendency of such appeal from

said judgment to the Supreme Court of Arizona by exemplified copies of the notice of appeal, bond and certificate of the Clerk of said Supreme Court that said appeal had been perfected, was then in good standing and undisposed of, (Pages 81-89 Transcript Record) it became the duty of the court below to grant said plea and stay proceedings herein until a determination had been had of said appeal and that its refusal so to do constituted resersible error.

SECOND ASSIGNMENT OF ERROR.

The appellant alleges error upon the refusal of the court to permit the filing of its amended demurrer and answer, which said amended demurrer and answer in addition to the defenses set up in the original demurrer and answer, demurred to the complaint upon the ground that there were several causes of action improperly united, and set up in addition to the defenses plead in the original answer, the defense that no written notice from plaintiffs or either of them, had been given as provided in said clause or rider, and further that under the provisions of said policy the limit of liability of defendant to any person for injuries sustained arising out of any one accident is the sum of Five Thousand Dollars. Defendant alleged that it was without information upon which to base a brief as to whether plaintiffs, or either of them, were injured in an accident occasioned by the automobile covered by said policy, or the extent or amount of injuries,

if any, to plaintiffs or either of them, and therefore denied that plaintiffs, or either of them, were injured in any accident covered by said policy.

In connection with defendant's application for leave to amend its answer the following pertinent facts are to be noted: On May 19, 1928, defendant filed its plea in abatement and a demurrer to the complaint. It naturally refrained at that time from answering to the merits because of the holding of many respectable authorities to the effect that by so doing it would constitute a waiver of its plea in abatement. As heretofore stated, the plea was denied on August 6, 1928, and judgment summarily entered against defendant for $15,000 without leave to answer. This judgment was on motion of defendant vacated on August 13, 1928, being just one week later, as having been entered contrary to Rules 15 and 20 of the Rules of Practice of the District Court of the United States for the District of Arizona, pertaining to amendments as of right upon the overruling of pleas and demurrers, and defendant was given leave to answer. On the same date (August 13, 1928), the case was ordered set for trial on the following Monday, or August 20, 1928. It is to be noted that the order vacating the judgment and allowing defendant to answer prescribed no particular time for so doing. With its motion to vacate said premature judgment the defendant had tendered an answer which was filed on August 9, 1929. At the time of the preparation of said answer the member of the firm of attorneys

representing defendant and handling the defense of said action was in California and same was prepared by others unfamiliar with the case as a whole and upon more mature consideration it was perceived that certain vital defenses had been overlooked in the hurriedly prepared answer. Consequently an Amended Demurrer and Answer embodying a complete defense to the action was prepared and filed several days before the trial date. As no time was specified in the order permitting the amendment and setting the case for trial the following week, leave was not asked of Court for filing the Amended Demurrer and Answer until Monday, August 20, 1928, following the filing of the same on Saturday, August 18, 1928.

On August 20, 1928, before proceeding to trial, the defendant as a mere formality requested that the record show leave of court for filing the Amended Demurrer and Answer. Said application was denied by the Court, first, upon the ground that proof could properly be offered and received under its original answer of all of the defenses set forth in defendant's proposed amended answer, second, upon the ground that said amended answer was not served and filed as prescribed by law, and third, because the first of the separate defenses contained therein, setting up lack of notice in avoidance of the policy was sham and frivolous in that the complaint alleged and the answer admitted that the defendant, General Accident, Fire & Life Assurance Corporation, Ltd., through its attorneys,

Messrs, Sloan, Holton, McKesson & Scott, appeared for and represented George Ross, the defendant in cause No. 10580 in the Superior Court of Yavapai County, Arizona, throughout said suit and said defendant was, therefore, estopped to set up and allege lack of notice.

It is obvious by an inspection of the original Demurrer and Answer and the Amended Demurrer and Answer that the latter sets up several affirmative defenses not contained in the former and which under the law would necessarily have to be specially pleaded in order to entitle defendant tto introduce evidence thereunder. Furthermore the amended demurrer includes the additional ground that several causes of action are improperly united. The judgment recovered by Clark and his wife in the Superior Court of Yavapai County, Arizona, against Ross was a joint one. Admitting for the purpose of the argument that Ross might not now be heard to complain of this fact, nevertheless it becomes highly material in a determination of the liability of the defendant in this action, General Accident Life & Fire Insurance Corporation, Ltd.

Under the terms of the rider attached to the policy sued upon by plaintiffs the insurance company agreed to pay any final judgment recovered against its assured, George Ross, by reason of any loss or claim covered by the policy, *up to the limits expressed in the policy* direct to the plaintiff securing the judgment. The following provision respecting the limit of liability is expressed in the policy:

"STATEMENT 8: Regardless of the number of the Assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000,-00) and, subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,-000.00)."

The pltintiffs' right to recover, if at all, is based upon the insurance policy and the rider attached thereto. As seen by the foregoing excerpt from the policy, it is clear that the contract limits the right of recovery for bodily injuries to any one person to $5,000.00. It is equally clear that the plaintiffs, in order to recover a sum greater than $5,000 must sue for damages for bodily injuries by reason of an accident covered by said policy sustained by two or more persons. Plaintiffs are claiming that they have a right of recovery of a total sum of $10,000 because of bodily injuries sustained by Etta Clark in the sum of $5,000, and bodily injuries sustained by L. A. Clark, her husband, in the sum of $5,000.00. It is only upon this basis that the judgment of the court below can be sustained.

In this connection it is interesting to note the finding of the Supreme Court of Arizona in its opinion above referred to. An exemplified copy of

said decision has been filed in this Court pursuant to the authority of the following cases:

Gulf etc. Ry. Co. v. Dennis,
32 S. Ct. 542,
224 U. S. 503;
Meccano, Ltd. v. John Wanamaker,
40 S. Ct. 463,
253 U. S. 136.

As regards compensation for bodily injuries alleged to have been suffered by Mr. and Mrs. Clark that Court found:

> "We conclude that if $1,000 actual damages be allowed to the husband and $6,000 to the wife on account of injuries sustained, they will be amply compensated."

In regard to injuries to Mr. L. A. Clark that Court found:

> "The husband, L. A. Clark, was but slightly injured. He was not prevented thereby from performing his usual work and received no professional services on account of his injuries."

The Supreme Court of Arizona ordered a remittitur of $5,000 which was filed by the Clark's, leaving a balance against Ross of $7,000 actual and $3,000 punitive damages. It would, of course, be an absurdity for anyone to claim that the defendant in this action, General Accident Fire & Life Assur-

ance Corporation, Ltd., would be liable for that portion of said judgment awarding punitive damages against Ross.

> "Inasmuch as the basis of an allowance of exemplary damages is the commission of an intentional wrong, they * * * can be awarded only as against one who has participated in the wrong."
> 17 C. J. 988,
> Cases cited under Note 32.

We quote further from the same work:

> "Exemplary damages are not generally recoverable against sureties upon bonds, even though the breach on the part of the principal was malicious or tortious."

Manifestly two separate and distinct causes of action are united in the complain herein, which fact was not covered by the demurrer filed under the circumstances above set out, a few days prior to the Amended Demurrer.

In Brookside-Pratt Mining Co. v. McAllister, 72 So. 18, we find the following language:

> "The action being joint, the plaintiffs were not entitled to recover damages which were purely personal to each and not joint as to both, such as physical or mental pain, anguish, or inconvenience of either the husband or the wife alone. Even if both suffered like damages in

this respect, such are necessarily separate and individual, and to each separately, and not to both jointly. Such separate and individual damages are not recoverable in a joint action like this.

Jefferson Fert. Co. v. Rich et al., 182 Ala. 633, 62 So. 40.

"Mr. Dicey, in his book on Parties, states the law and rules of practice correctly and succinctly as follows:

'1. Persons who have a separate interest and sustain separate damages must sue separately.

'2. Persons who have a separate interest, but sustain a joint damage, may sue either jointly or separately in respect thereof.

'3. Persons who have a joint interest must sue jointly for an injury to it.'

Dicey on Parties to Actions (2d. Ed.) 401.

"Several parties cannot sue jointly for injuries to their respective persons. The principle underlying the rule is that it is not the act which injures one or both, but the consequence of the act, in the way of damages, that determines whether plaintiffs should join or sever. One stroke or one word may injure two or more alike, in the person or in the feelings, yet their actions are separate and not joint. There can be no joint action in such cases because one cannot share the suffering or injury of the other. 1 Chit. p. 64. If there be an improper joinder in such cases, advantage may be taken thereof by appeal or writ of error, whether the matters appear in the pleading or not."

The Federal Courts have adopted the liberal rules prevailing in most of the State Courts regarding amendments of pleadings.

Jones v. Rowley, 73 Fed. 287;
Derk P. Yonkerman Co. v. C. H. Fuller's Ad-Agency, 135 Fed. 613;
Philadelphia & Reading Coal & Iron Co. v. Kever, 260 Fed. 534.
(Certiorari denied—Kever v. Philadelphia & Reading Coal & Iron Co., 250 U. S. 665, 40 S. Ct. 13, 63 L. Ed. 1197).

The Supreme Court of the State of Arizona in the case of Perrin v. Mallory Commission Co., 8 Ariz. 404, 76 P. 476, has held that a demurrer is an answer under the statutes of Arizona and that an answer, by said statute, may be amended before trial without leave, as a matter of right, and that the defendant had the right under the statutes at any time before trial to amend his pleading by setting up a new defense and the trial court erred in striking the amended answer from the files and refusing to consider it.

In the case of Timmons v. Wright, 22 Ariz. 135, 195 P. 100, the trial court, after ruling on the demurrers and motion to strike, refused to permit the defendant the right to amend and answer to the merits of the complaint. The Supreme Court, in determining the case, said:

"If appellants were right in their contention that only the law questions had been sub-

mitted, they should have been permitted to amend as a matter of right, while, if the court and appellees were correct in their understanding, the amendment should have been permitted under the circumstances in the exercise of a wise discretion.

"The fact alone that the appellants' answer contained only demurres and a motion to dismiss would not justify the conclusion that it was their intention not to answer to the merits in case the law questions raised should be decided against them, notwithstanding the requirements of paragraph 467, Civil Code of 1913, that all the pleas of a defendant shall be filed at the same time.' The provisions of paragraph 422, Civil Code of 1913, permitting an amendment any time before trial without leave of court and at any stage of the action with such leave, enables a defendant to test the law questions involved in his case before pleading to the merits. Perrin v. Mallory Com. Co., 8 Ariz. 404, 76 P. 476."

In the case of Senate S. M. Co. v. Hackberry etc. Co., 24 Ariz. 481, 211 P. 564, it was held that the trial court abused its discretion in refusing, under the circumstances, to permit the filing of an amended answer during the trial of the case; that the defendant was surprised by the turn of events and that it was evident he relied upon a trial on the merits and that of counsel made a mistake it would seem that their client should not be made to suffer thereby. The Arizona Supreme Court, citing Perrin v. Mallory Comm. Co., supra, said:

"A very good reason for the existence of this rule is that the plaintiff may take a nonsuit and commence another action, whereas the defendant, if denied the privilege of amending, might be without remedy. Our own statute relating to amendments is so liberal that it would be difficult to extend it by construction, and we are not at liberty to place upon it limitations which the legislature has not seen fit to prescribe."

"The general rule is well stated in 21 R. C. L. 572:

'It is a general rule that amendments to pleadings are favored and shall be liberally allowed in furtherance of justice. The exercise of the power to permit amendments rests in the sound discretion of the trial court; and, as a rule, this discretion will not be disturbed on appeal except in case of an evident abuse thereof, or unless the appellant shows affirmatively that he was prejudiced by the ruling. It is the usual practice of the courts to allow rather than to refuse amendment.' "

We maintain that the provisions of Chapter 14 Session Laws of Arizona, 1925, amending Sec. 422 Civil Code, 1913, and reading:

"All pleadings or proceedings may upon leave of the court be amended at any stage of the action upon such terms as the court may prescribe, or the same may be amended without such leave, not less than five days before trial, upon serving the adverse party with a copy of such amended pleadings or proceedings."

cannot with any sense of justice or right be invoked as sustaining the refusal to permit the defendant to file such amended pleading. As heretofore stated the trial Court on Monday, August 13, 1928, entered its order (Transcript Record, p. 148) setting aside the judgment theretofore prematurely rendered ,allowed defendant to file answer, and set the case for trial on the following Monday, August 20th. Under the amendment to the State statute just cited this would have required defendant to have filed its Amended Answer not later than Wednesday, August 15th, or two days after the entry of the order permitting it to answer to the merits, which we think any Court would agree to be an unreasonably short time for the preparation and filing of a pleading of the sort under consideration.

A third ground set up for the refusal of permission to file the Amended Demurrer and Answer was that one of the defenses plead therein was sham and frivolous. Conceding for the purpose of the argument alone that this was true, there still remained therein a number of good and valid defenses to the action, the refusal to permit the filing of which, we contend was error. However, we most strenuously deny the charge that the defense of lack of notice was sham or frivolous and that the defendant was estopped by virtue of its defense of the action against its assured, Ross, in the Superior Court, from asserting the defense in this action.

In that regard the rider attached to the Ross policy and under which the appellees are claiming, reads:

> "PROVIDED, however, that no person suffering loss or damage, either to person or property, shall be entitled to avail himself of the benefits of this endorsement and rider to the policy unless within 20 days from the date of suffering said loss or damage he shall serve written notice thereof upon the representative of the General Accident Fire and Life Assurance Corporation, Limited, at its office at Phoenix, Arizona."

It requires no citation of authority to sustain the proposition that where a policy of insurance requires as a prerequiste to the assertion of a right thereunder the giving of notice to the company of a loss or claim arising under the policy, no action can be maintained by the assured or party seeking to avail himself of the benefits of the policy until such notice has been given. This general principle is qualified by the fact that such notice may be waived by the insurer either in express terms or by implication, viz., by conduct inconsistent with its right to require such notice. One of the grounds upon which the Court below based its refusal to permit appellant to file its Amended Demurrer and Answer was the fact that it was estopped to plead want of notice because it had participated in the defense of the action against Ross in the Superior Court of Yavapai County. We do not believe it to

be the law that by performing its contractural duty under the policy and assuming the defense against a claim under a rider like that involved here, the insurance company is estopped to later set up failure on the part of the person making such claim to give the notice required by the rider.

In Oakland Motor Car Co. v. American Fidelity Co., 155 N. W. 729, the Supreme Court of Michigan held that where an insurer undertook to defend an action covered by an automobile policy on the representations of the insured that it had not received notice of the occurrence until the filing of suit, such act was not a waiver of the insurer's right, upon discovering the fact that it had received notice months previously, to rely on a provision of the policy requiring the insured in case of an accident to give immediate notice. The Court in that case in discussing the obligation to give notice said:

> "Contracts of insurance against the consequences of the insured's negligence are, as a rule, limited, and but partial. Conditions for notice of the event insured against similar to those under consideration are common in policies for most kinds of insurance. They are nothing new or misleading. Such stipulations, when contained in the policy, are recognized as valid, and must be complied with before recovery can be had, if within the power of the insured. Plaintiff's right to indemnity flows from this policy, constituting the written agreement between the parties which they voluntarily entered into and of which these

conditions form a part. Failure by plaintiff to observe the condition precedent of this executory contract was failure to perform the contract on its part. It first breached the contract, and by such nonperformance it released the other contracting party. In order to maintain this action, it was bound to give notice of both the accident and claim for damages as and when by the terms of the contract it agreed to do so.

"For the foregoing reasons, we are constrained to conclude that, as a matter of law, under the undisputed evidence, plaintiff failed to give timely notice of the accident and claim in compliance with its agreement as expressed in the conditions of this policy under which recovery is sought, and a verdict should have been directed for defendant."

"The judgment is therefore reversed, without a new trial."

In all cases we have been able to find upon the subject the question under consideration was the effect of failure on the part of the *assured* named in the policy to give notice of a suit or claim being made thereunder. In the case at bar persons not parties to the contract but for whose benefit it, by virtue of the rider required by the Corporation Commission of Arizona, was entered into, are claiming under the policy. To recover such parties must bring themselves squarely within the contract made for their benefit and show that the notice therein specifically required was given. We submit that the appellant in participating in the de-

fense of the action against its assured, in the Superior Court in no way waived its right to insist upon fulfilment of this condition of the rider attached to the policy, or is estopped in this action to stand upon its contract as entered into.

We submit that in the exercise of a just discretion, in view of the circumstances of the case and the undue haste required of defendant at every stage of the proceedings, that the filing of the Amended Demurrer and Answer should have been allowed and that the Court's refusal to permit the same constituted error prejudicial to the rights of the defendant.

THIRD ASSIGNMENT OF ERROR.

Appellant charges error on the part of the trial court in receiving in evidence Plaintiff's Exhibit No. 1, said exhibit purporting to be a copy of the printed Abstract of Record in the Supreme Court of the State of Arizona, in the appeal of cause No. 10580, L. A. Clark and Ettta Clark vs. George Ross, from the Superior Court of the County of Yavapai, State of Arizona, over the objection of defendant.

The bill of exceptions certified by the trial court to this Court, in referring to the reception of this document in evidence, states:

> "That said instrument or document was not nor did it purport to be a certified copy or copies of the records of the Supreme Court of

the State of Arizona, or of the Superior Court of the County of Yavapai, State of Arizona, or of any other court. That said instrument or document was not nor did it purport to be the original of any judgment, judgment-roll or any other record of the Superior Court of the County of Yavapai, State of Arizona, or of any other court. That said instrument or document did not contain the original nor any copy of the judgment-roll in cause No. 10580 in the Superior Court of the County of Yavapai, State of Arizona, certified to under the hand and seal of the lawful possessor of such records.

"That counsel for plaintiffs stated that said document so offered was offered for the purpose of proving the pleadings, the judgment and verdict and other matters essential to be proven in this case in the case of L. A. Clark and Etta Clark vs. George Ross, Cause No. 10580, Superior Court of Yavapai County, Arizona, and referred to in plaintiff's complaint. That attached hereto is a true copy of the pleadings, instructions, verdict and judgment in said Cause No. 10580 in said Superior Court, as shown by said purported Abstract of Record, received in evidence herein as Plaintiff's Exhibt 1.

"That counsel for defendant objected to the introduction in evidence of said instrument or document upon the ground that it was not the best evidence and that said offer did not conform to the law with reference to the manner and mode for proving official documents and court records within the State of Arizona. That the Court did thereupon overrule defend-

ant's objection to the admission of said instrument or document in evidence and did admit the same in evidence as plaintiff's Exhibit No. 1, for the reason, as stated by the Court, that in view of the allegations in the answer admitting certatin allegations contained in Paragraph VI of the complaint herein, said Exhibit No. 1 was admissible, which said paragraphs of the complaint and answer are as follows, to-wit: Paragraph VI of the complaint reads as follows:

'VI.

'That plaintiffs thereafter instituted an action in the Superior Court of Yavapai County, Arizona, being Cause No. 10580 therein, against said George Ross to recover damages for and on account of said injuries suffered by plaintiffs as aforesaid in which said action appearance was entered in the name and on behalf of said George Ross by counsel employed by defendant, to-wit: Messrs. Sloan, Holton, McKesson and Scott, of Phoenix, Arizona, and said counsel, together with other counsel employed by said George Ross, appeared for and represented said George Ross throughout said suit; that said cause was tried by said Court, with a jury, and on the 9th day of November, 1927, plaintiffs, jointly, recovered a judgment against said George Ross for and on account of said bodily injuries suffered by plaintiffs, and each of them, as aforesaid, in the sum of Fifteen Thousand Dollars ($15,000.00),

together with costs assessed at the sum of $196.35.'

"Paragraph VI of the answer reads as follows:

'VI.

'Admits the allegations contained in Paragraph VI thereof.' "

It will be noted that said document was offered by plaintiffs for the express purpose of "proving the pleadings, the judgment and verdict and other matters essential to be proven in this case in the case of L. A. Clark and Etta Clark vs. George Ross, Cause No. 10580, Superior Court of Yavapai County, Arizona, and referred to in plaintiff's complaint."

Rule 43 of the Rules of Practice of the United States District Court for the District of Arizona, provides as follows:

"RULE 43
Admissibility of Evidence.

"Except as otherwise provided by act of Congress, the State laws in relation to the admissibility of evidence shall be the rule of decision in this Court in actions at law."

Section 1739, Revised Statutes of Arizona, 1913, Civil Code, reads as follows:

"1739. Copies of the records of all public officers and courts of this state, *certified to*

> *under the hand and seal (if there be one) of lawful possessor of such records,* shall be admitted as evidence in all cases where the records themselves would be admissible."

Manifestly the purported abstract of record received as Plaintiff's Exhibit 1 was not lawful evidence of the facts appearing therein. The admission by the defendant in Paragraph VI of its answer that the Clarks had recovered a judgment against Ross in said cause 10580 in said Superior Court was no admission of its terms or that the purported judgment and pleadings set out in the uncertified copy of said Abstract of Record were in fact copies of the original documents on appeal to the Supreme Court of Arizona.

We think it will suffice in this connection to cite the text found in 34 Corpus Juris at page 1103, as follows:

> "In an action on a domestic judgment the existence and terms of the judgment should be proved by the production of a transcript or exemplification of it, *attested in accordance with local law.*

The cases cited under note 32 fully bear out the text.

The reception of said document in evidence should have been refused on the further ground that the same was not authenticated as provided by the Act of Congress pertaining to proof of judicial proceed-

ings and records of any state or territory, or of any country subject to the jrisdiction of the United States.

Rev. Stat. U. S. sec. 905;
U. S. Comp. Stat. 1918, sec. 1519;
3 Fed. Stat. Ann. (2d. Ed.) 212.
U. S. Code Annotated, Title 28, sec. 687.

Said act reads as follows:

"AUTHENTICATION OF LEGISLATIVE ACTS; PROOF OF JUDICIAL PROCEEDINGS OF STATE. The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Manifestly, before the document introduced herein by plaintiffs would be entitled to the full

faith and credit contemplated by the Act it must be authenticated in the manner therein prescribed. We submit that defendant's objections to the introduction of said document in evidence should have been sustained and that its motion to strike the same, assigned as error in its Seventh Assignment, argued herewith, should have been granted.

FOURTH ASSIGNMENT OF ERROR

This Assignment is directed at the admission in evidence as Plaintiffs' Exhibit No. 2 over the objection of the defendant of the policy of insurance issued by defendant herein to George Ross (Transcript Record, page 66). Objection was made to the introduction of this document in evidence upon the ground that no proper foundation had been laid therefor in that it had not been shown that the automobile described in said policy was the automobile referred to in plaintiff's complaint. It is to be remembered in this connection that Ross, the defendant in the action in the Superior Court, was the owner and operator of a fleet of taxicabs and for-hire cars in Prescott, Arizona, and vicinity; that said policy was not a blanket one covering all cars owned by said defendant, Ross, but covered one particular automobile, viz:

> Paige 5 Passenger Sedan, 1926 Model, 6 cylinders, Motor No. 417333, Serial No. 409495.

The general rule in such cases is stated in 38 Cyc. 1350, as follows:

> "According to the great weight of authority, in order to entitle a party to introduce evidence as a matter of right, it must be admissible at the time it is offered. If proof of other facts is necessary to render it admissible the court may properly reject it, or require proof of such facts before admitting it."

The only exception to the general rule regarding the laying of the proper foundation for the reception of such evidence by necessary preliminary proof is where such proof is later supplied and the error cured. No preliminary proof of identity of the car described in the policy and that in the complaint was offered at the time said policy was received in evidence in this case, nor was such proof later supplied.

In the case of Emery Consol. Mining Co. v. Erickson, 208 Pac. 935, it was held in an action in claim and delivery to recover property alleged unlawfully in possession of defendant, a judgment docket of a justice of the peace showing action by plaintiff against vendor of defendant for purchase price of similar property was inadmissible, where it was not established that the property mentioned in the complaint for which action in the justice court was brought was identical with that described in the action in claim and delivery.

See also Leal v. Moglia, 192 S. W. 1121, holding that in trespass to try title, a sheriff's deed whose description was insufficient without the aid of extrinsic evidence should have been excluded, where such extrinsic evidence was not offered.

Similarly in the case of Sheehan v. Minneapolis & St. L. R. Co., 193 N. W. 597, an action for damage to a shipment of horses, that a letter in which plaintiffs claimed damages for injuries to a certain shipment of horses was not admissible in the absence of a showing that any of the horses which the letter claimed to have been injured were included among the horses for injuries to which the action was brought.

It is hardly necessary to state that this lack of preliminary proof cannot be aided by the inference that because the automobile designated in the complaint and that described in the policy both bore the name "Paige" that they were one and the same. Mere evidence of similarity of names is insufficient in such a case to supply the necessary preliminary proof.

Gibson v. Mason, 121 S. E. 584;
Stiegler v. Eureka Life Ins. Co., 127 A. 397.

In concluding our argument of this assignment we desire to call attentaion to the decision of this Court in United Verde Copper Co. v. Jordan, 14 Fed. (2d) 299; 14 Fed. (2d) 304; affirming the ruling of the District Court of Arizona in excluding

such evidence until the proper preliminary foundation therefor had been laid. (Opinion of Court below—9 Fed. (2d) 144).

FIFTH AND SIXTH ASSIGNMENTS OF ERROR

Appellant's fifth and sixth assignments of error charge error in the reception in evidence as Plaintiffs' Exhibits 3 and 4, respectively, of a letter dated July 7th, 1928, from the law firm of Anderson & Gale, attorneys for the Clarks (Transcript Record, p. 129) to one B. F. Hunter, and a reply thereto (Transcript Record, p. 131). For the sake of brevity, as the same argument pertains to each of these letters, they will be considered together.

Said letters were offered by plaintiffs for the purpose of showing compliance with the provision in the rider attached to the policy relating to notice to the General Accident, Fire & Life Assurance Corporation, Limited, of an injury and claim under the policy. Objection was made by defendant to each of said letters upon the ground that said letters did not show or purport to show that B. F. Hunter was an accredited agent, or any agent of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon herein; that said letters did not constitute notice to defendant company as provided by the terms of said policy; that no evidence whatever had been introduced by plaintiffs that said B. F. Hunter was in truth and in fact an agent of the defendant corporation authorized to represent

or bind the defendant corporation, and that said letters and each of them were wholly irrelevant and immaterial and not competent evidence of any fact material to the issues of this case. It will be noted that the letter of Anderson & Gale, dated July 7th, 1927, was not addressed to the defendant in this action, the General Accident Fire & Life Assurance Corporation, Limited, but to a "Mr. B. F. Hunter, c/o Standard Accident Ins. Co., Phoenix, Arizona." The Standard Accident Insurance Company is a corporation with its principal place of business at Detroit, Michigan, and has not nor has it ever had any connection with the defendant in this action; Its agent was The Standard Agency, Inc., at Phoenix, Arizona. On July 11, 1927, Mr. B.F.Hunter replied to the aforesaid letter, on the letterhead of The Standard Agency, Inc., in which letter he neither mentions the defendant in this action nor purports to act as its representative in any capacity whatever. Manifestly no showing whatever was made by plaintiffs that B. F. Hunter was an accredited agent, or any agent of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon herein, or that he was authorized to represent or bind the defendant corporation in any manner whatever. A feeble and wholly ineffectual attempt was made to establish this fact by placing Mr. Stock, of counsel for plaintiff. on the stand, who testified in that regard as follows:

"Mr. Anderson: Q. Do you know who Mr. Hunter represented?

Mr. Holton: Object to that question.

The Court: Objection overruled.

A. I am not acquainted with him personally, but he signs the letter on behalf of the Standard Agency.

Mr. Holton: Object to that. The letter speaks for itself.

Mr. Anderson: Q. Did he come to our office representing any particular insurance company?

A. I never talked to him personally.

Mr. Holton: He has already stated he is not acquainted with him.

Mr. Anderson: Q. Do you know that he came there?

A. I think he came there at one time, yes.

Q. Do you know who he represented?

A. He represented the Ross insurer.

Mr. Anderson: That is all.

CROSS-EXAMINATION
By Mr. Holton.

Q. Mr. Stack, you stated at one time that you were not acquainted with this gentleman.

A. I am not personally acquainted with him, no.

Q. You did not see him when he was at the office—he did not interview you?

A. I never talked to him personally, so far as I now recall."

We submit that no showing whatever was made that B. F. Hunter was an accredited agent or rep-

resentative, or any agent or representative of the defendant company upon whom written notice could be served as required in the policy of insurance sued upon, or that said B. F. Hunter was an agent of the defendant corporation authorized to represent or bind the defendant corporation. Therefore, we contend that said letters were wholly irrelevant and immaterial and not competent evidence of any fact material to the issues of this case and that the trial Court erred in admitting them in evidence.

SEVENTH ASSIGNMENT OF ERROR

Error is charged by appellant in its seventh assignment of error upon the refusal of the trial court to grant defendant's motion made at the close of plaintiff's case to strike Plaintiffs' Exhibit No. 1, said exhibit purporting to be a copy of the printed Abstract of Record in the Supreme Court of Arizona in the appeal of cause No. 10580 from the Superior Court of the County of Yavapai, State of Arizona. The law bearing upon the reception of this document in evidence was fully set forth in our argument under the third Assignment of Error and reference is hereby made for the purpose of brevity to our argument under that assignment.

EIGHTH ASSIGNMENT OF ERROR

For the purpose of brevity, and as the same argument is applicable to each assignment, Assignment number eight will be aruged in connection with the Thirteenth Assignment of Error.

NINTH ASSIGNMENT OF ERROR

For the reason stated under the Eighth Assignment of Error we will argue our Ninth Assignment of Eror in connection with the Fourteenth Assignment of Error.

TENTH ASSIGNMENT OF ERROR

Likewise the Tenth Assignment of Error will be argued in connection with the Fifteenth Assignment of Error.

ASSIGNMENTS ELEVEN AND TWELVE

Error is charged in these assignments upon the refusal of the trial court to permit counsel for defendant to propound a question to the witness as to a statement made by LeRoy Anderson, counsel for plaintiffs, in his argument to the jury in cause No. 10580 in the Superior Court of Yavapai County, Arizona, to the effect that no claim was being made by the plaintiffs in that case for any injuries that may have been sustained by the plaintiff, L. A. Clark. It is to be noted that the judgment in that cause awarded damages to the plaintiffs jointly in the sum of $15,000; that there were no separate findings as to personal injuries, if any, received by the respective plaintiffs. The fact that said judgment (Transcript Record, p. 117) read:

> "IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs, L. A. Clark and Etta Clark, his wife, do have and recover of and from defendant, George Ross, the sum of Fif-

> teen Thousand Dollars ($15,000.00), together with interest", etc.

in nowise implies that personal injuries were received by both the husband and wife, parties plaintiff.

It is provided by the Revised Statutes of Arizona, 1913, Civil Code, sec. 403, as follows:

> "403. When a married woman is a party her husband shall be joined with her except:
> (1.) When the action concerns her separate property she may sue or be sued alone.
> (2.) When the action is between herself and her husband, she may sue or be sued alone."

Under the foregoing statute the husband is an indispensable party plaintiff to an action for personal injuries brought by the wife. By no possible stretch of the imagination can it be said that a judgment awarding damages for personal injuries in an action jointly brought by them, which judgment in no manner sets out the amount of damages to each, or for which party plaintiff they were awarded, implies equal or any damages and injuries to both.

While Ross, the defendant in that action might not now be heard to complain that such damages were not seggregated, the plaintiffs are not proceeding against Ross but against another whose liability is limited strictly to damages for bodily injuries

sustained arising under its contract, and to the amounts therein set forth.

The limitation of liability stated in the policy is as follows:

> "STATEMENT 8: Regardless of the number of the Assured involved, the Corporation's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand Dollars ($5,000.00), and subject to the same limit for each person, the Corporation's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars."

Had the plaintiffs in said action in the Superior Court only been claiming damages for the injuries to one person, namely, Mrs. L. A. Clark, and their counsel so declared in open court, it is obvious that whatever judgment was therein recovered would have been enforcible against the Ross insurer to the limit of liability for damages for personal injuries to one person expressed in the policy, or $5,000.00.

That an attorney has the power to bind his client by his statements or admissions in court is well settled.

Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261;
Harniska v. Dolph, 133 Fed. 158.

EIGHTH AND THIRTEENTH ASSIGNMENTS OF ERROR

These Assignments charge error in the overruling of defendant's demurrer to the evidence at the close of plaintiffs' case and at the close of the entire case respectively. As the argument under Assignments Fourteen and Fifteen is applicable here, for the sake of brevity, said assignments will be argued together.

The contention of Clark and his wife being that said judgment was for personal injuries to each, and the verdict and judgment being silent upon this subject, with the exception that the word "plaintiffs" was used therein, which was only the proper procedure under Sec. 403 Rev. Stats. Arizona, 1913, Civil Code, above cited, the defendant in this case had the right to show the true facts. A waiver by Mr. Anderson, counsel for plaintiffs, by his statement in the argument to the jury, that he was claiming no damages on account of personal injuries to Mr. Clark in that action, was proper to be shown. The two witnesses to whom the alleged objectionable question was propounded, were each attorneys present throughout the entire trial of Clark vs. Ross, No. 10580, in the Superior Court of Yavapai County, and heard the argument in which the statement of counsel for plaintiffs waiving any claim for injuries to Mr. Clark was alleged to have been made.

We submit that the trial court by sustaining the objection to these questions and refusing the offer of proof above mentioned deprived defendant of a substantial right to its prejudice.

NINTH AND FOURTEENTH ASSIGNMENTS OF ERROR

Our Ninth Assignment of Error is directed at the order overruling the defendant's demurrer made at the close of plaintiff's case that it appeared from the evidence at said time that there were two causes of action improperly united in the complaint, viz.,

that the plaintiffs were claiming in one cause of action damages for personal injuries to two separate persons, namely, L. A. Clark and Etta Clark, his wife. The Fourteenth Assignment of Error charges error upon the overruling of the same demurrer which was renewed at the close of the entire case.

Under Statement 8 of the policy, above set forth, the liability of the insurer for loss from an accident resulting in bodily injuries to or in the death of one person is limited to $5,000, and, subject to the same limit for each person, its total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to $10,000.00.

The argument under our Second Assignment, in which we cited Brookside-Pratt Mining Co. v. McAlister, 72 So. 18, is applicable here. Any right of action each may have for personal injuries is separate and distinct from that of the other. While, of course, the husband, under Sec. 403, Civil Code, Arizona, supra, would have to join as a formal party plaintiff in the wife's action, nevertheless for personal injuries alleged to have been received by him, he would have to sue separately. We again quote from the McAlister case, supra:

> "The action being joint, the plaintiffs were not entitled to recover damages which were purely personal to each and not joint as to both, such as physical or mental pain, anguish,

or inconvenience of either the husband or the wife alone. Even if both suffered like damages in this respect, such are necessarily separate and individual, and go to each separately, and not to both jointly. Such separate and individual damages are not recoverable in a joint action like this."

TENTH AND FIFTEENTH ASSIGNMENTS OF ERROR

Appellant's Tenth and Fifteenth Assignments of Error charge that the court erred in denying defendant's motion made at the close of plaintiffs' case and at the close of the entire case, respectively, for judgment in favor of the defendant and against the plaintiffs for the reason that the evidence at said times failed to show: (1) What, if any, amount each of the plaintiffs was entitled to recover; (2) That the injuries complained of were not shown to have been caused by the automobile described in the policy of insurance sued upon in this action; (3) That two causes of action were improperly united in that the policy of insurance introduced in evidence did not give the right to plaintiffs to recover jointly, but limited each to the amount of his or her injury, not to exceed $5,000 each, and there was no showing as to what damages were sustained by each of said plaintiffs; (4) That plaintiffs had wholly failed to establish by the evidence the facts necessary to entitle them to recover under the terms of the policy upon which they were suing.

It is apparent that before there can be a recovery by plaintiffs or either of them against the defendant in this action there must be competent proof of *bodily injuries* suffered by one or both, as distinguished from damage to legal rights as loss of consortium and the like.

In this connection we quote the following from Williams v. Nelson, 117 N. E. 189:

> "The husband of the female plaintiff recovered judgment against the insured for the loss or damages sustained by him because of the physical injury to his wife. The question is whether this judgment is for the 'bodily injury * * * of any person.' Bodily injury imports harm arising from corporeal contact. In this connection 'bodily' refers to an organism of flesh and blood. It is not satisfied by anything short of physical, and is confined to that kind of injury. It does not include damage to the financial resources of the husband arising from a bodily injury to the wife. Hey v. Prime, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570 and cases cited; Keating v. Boston Elevated Ry., 209 Mass. 278, 282, 95 N. E. 840. Personal injury in other connections has been held to be of more comprehensive significance. Mulvey v. Boston, 197 Mass. 178, 180, 83 N. E. 402; 14 Ann. Cas. 349; Madden's Case, 222 Mass. 487, 492, 111 N. E. 379, L. R. A. 1916D. 1000. But 'bodily injury * * * of any person' cannot reasonably be held to include the kind of loss suffered by the husband.
>
> It follows from what has been said that in

the suit by the wife the entry must be decree affirmed with costs, and in that by the husband the decree must be reversed, and in accordance with St. 1913, c. 716, sec. 2, a new decree entered dismissing his bill with costs.

So ordered."

Also the case of Klein v. The Employers' Liability Assurance Corporation, 9 Ohio Appellate Reports 241. For the convenience of the Court and as the opinion is brief, we have set it out in full:

"BY THE COURT. The policy upon which this action is based indemnifies plaintiffs 'against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any person or persons by means of the maintenance or use' of a certain automobile, within certain limits of time and place, subject to certain conditions among which is:

> 'Condition A: The Corporation's liability on account of an accident resulting in such injuries to one person, including death, is limited to Five Thousand Dollars ($5,000.00), and, subject to the same limit for each person, the Corporation's total liability on account of any one accident resulting in injuries to more than one person, including death, is limited to Ten Thousand Dollars ($10,000.00).'

"By reason of bodily injuries to Jennie Goldstein damages have been recovered and paid

to her and also to her husband, Daniel Goldstein. It is conceded by defendant that it is bound to indemnify plaintiffs for both these recoveries subject to the limitation expressed in the policy. The only question to be determined is whether the limit of liability is five thousand or ten thousand dollars.

"We hold that this limit is five thousand dollars.

"This is clearly fixed by the first clause of Condition A: 'The Corporation's liability on account of an accident resulting in such injuries to one person, including death, is limited to Five Thousand Dollars.' This clause by the use of the word 'such' injuries refers only to bodily injuries, and limits the indemnity, no matter how many may recover because of such injury, since, as in this case, more than one person may claim and secure damages for bodily injuries to the one person.

"The latter part of Condition A, which increases the limit where more than one person is injured as a result of any one accident, is distinctly stated to be 'subject to the same limit for each person,' that is, to the five thousand dollar limit for each person receiving bodily injuries.

"We are in accord with the opinion of Judge May in the trial court, as found in 19 N. P. N. S. 426.

"Judgment affirmed."

To the same effect see Ravenswood Hospital v. Maryland Casualty Co., 117 N. E. 485.

It was, therefore, incumbent upon the plaintiffs, in order to bring themselves within the terms of this policy, to have introduced evidence of bodily injuries to each, and to have a definite and conclusive finding in the judgment as to the amount of damages sustained by each for bodily injuries. This they failed to do. The burden of proof was upon the plaintiffs to bring themselves within the terms of the contract and to show by a preponderance of the evidence that they and each of them suffered bodily injuries for which a final judgment was rendered. We confidently assert that there is no such proof. The only evidence in the case touching upon that question is the judgment, and it is silent as to the amount of injuries, if any, sustained by either Mr. or Mrs. Clark. We have heretofore argued the questions that the injuries complained of were not shown to have been caused by the automobile described in the policy of insurance sued upon in this action, and that two causes of action were improperly united. Also that there was no competent proof before the trial court of the terms of the judgment sued upon in this action.

So far as the record introduced by the plaintiffs is concerned, the judgment might have been rendered upon any one of the three different theories or causes of action embodied in the complaint. (Complaint in Cause No. 10580 in the Superior Court of Yavapai County, Arizona, will be found at page 95, Transcript Record.)

In Lewis v. Ocean Nav. etc. Co., 125 N. Y. 341, 26 N. E. 301, it was held:

> "Where a judgment may have proceeded upon either or any of two or more different and distinct facts, the party desiring to avail himself of the judgment as conclusive evidence upon some particular fact must show affirmatively that it went upon that fact, or else the question is open for a new contention."

And in the case of Littlefield v. Huntress, 106 Mass. 121, it was held that where, in a suit against the maker of a promissory note, the defendant interposes two defenses, one of which is to the effect that the note was originally void and the other that, if originally valid, the note was subsequently discharged by agreement between the parties, and a judgment is rendered for the defendant, wherein it does not appear on what ground the decision was made, the question whether the note was originally void is not res adjudicata.

To the same effect are:

Matson v. Poncin,
152 Iowa 569;
132 N.W. 970,
38 L.R.A. (N.S.) 1020;
Leonard v. Schall,
157 N. W. 723,
4 A.L.R. 1166.
Berkhoefer v. Burkhoefer,
67 S. W. 674.

The Supreme Court of the United States in no uncertain language has decided the question involved here. In Russell v. Place, 94 U. S. 606, 24 L. Ed. 214, Mr. Justice Field, speaking for the court, said:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. * * * According to Coke, an estoppel must 'be certain to every intent'; and if, upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence."

The foregoing case was cited with approval in DeSollar v. Hanscome, 158 U. S. 216, 15 S. Ct. 816, 39 L. Ed. 956, wherein it was said:

> "There is in this case no extrinsic evidence tending to show upon what the verdict of the jury was based. We have simply the record of the former judgment, including therein the testimony and charge of the court, from which to determine that fact; and, in the light of the charge, it is obviously a matter of doubt whether the jury found that the agreement made by the agent was ratified by the principal, or that no damage had in fact been sustained by placing the papers upon record. We are not now concerned with the inquiry whether the instructions of the court were correct or not. We look to them simply to see what questions were submitted to the jury, and if they left it open to the jury to find for the defendant upon either of the two propositions, and the verdict does not specify upon which the jury acted, there can be no certainty that they found upon one rather than the other. The principal contention, therefore, of the plaintiff fails."

We submit that the judgment attempted to be introduced in evidence in this case by the plaintiffs, standing alone does not show upon its face that either of the plaintiffs were awarded damages for bodily injuries. It wholly fails to show upon which of the several theories set up in the complaint the jury rendered its verdict which was the basis of the

judgment. Not only are juries precluded from speculating as to matters of fact, but courts likewise are so precluded. If the plaintiffs in this action desired to avail themselves of the benefits accruing to them under the contract with the assured, Ross, it was their duty to bring themselves strictly within its terms.

The plaintiffs could by special interrogatories or by separate verdicts have had adjudicated and determined the amount due to each of them from Ross for bodily injuries sustained. Without such special findings or special verdicts it is a matter of pure conjecture and speculation as to what the jury would find and as to what the judgment is for. We submit that under all the authorities plaintiffs are not entitled to a judgment in this action upon such evidence or lack of evidence.

Furthermore, in order that the judgment in the former action may operate as a bar, the issues in the second action must have been necessary and material issues in the first action and determined therein, and where this was not the case, they are open to be litigated in the later action.

Cromwell v. County of Sac,
94 U. S. 351,
24 L. Ed. 195;
Davis v. Brown,
94 U. S. 423,
24 L. Ed. 204;
Virginia-Carolina Chemical Co. v. Kirven,
215 U. S. 252,

30 S. Ct. 78;
Radford v. Myers,
34 S. Ct. 249.
231 U. S. 725.

The case of American Paper Products Co. v. Aetna Life Ins. Co., 223 S. W. 820, is, we feel, also squarely in point here. There it was held that a judgment in an action against an employer by an employee was inadmissible in an action by the employer against a casualty company for indemnity, where there were four issues involved in the case and the court made a general finding in favor of the plaintiff upon the issues joined, since it would be mere conjecture as to what issue or issues were determined.

We submit that the motion of the defendant for judgment in its favor at the close of the plaintiffs' case, which motion was renewed at the close of the entire case, should have been granted for the reason that there is no evidence in this case upon which a judgment could properly be predicated. In rendering its judgment in this case the Court below must of necessity have been required to guess or conjecture as to what the jury had in mind in the Ross case when it rendered its verdict. As neither the verdict nor the judgment contain any language from which a court can determine whether the judgment was based upon bodily injuries sustained by Clark, his wife, or either of them, or whether any part of said judgment is based upon bodily injuries, no recovery can be sustained. In that

regard we say that the plaintiffs wholly failed to carry the burden of proof imposed by law upon them.

In conclusion we respectfully submit that in addition to the fact, as we contend, that the defendant through the errors to which we have called attention, was not afforded a fair trial and that on such ground the cause should be reversed, the whole structure of plaintiffs' action has fallen by reason of the fact that the judgment upon which plaintiffs base their action is no longer in existence. We have caused to be filed with the Clerk of this Court an exemplified and authenticated copy of the opinion of the Supreme Court of Arizona and under the authorities which we have heretofore cited we believe it is not only within the power of this Court, but that it is the duty of this Court to consider the situation as it now exists, the Supreme Court of the State of Arizona having rendered its final decision in cause No. 2752, Ross v. Clark.

In that regard we not only rely upon the cases of Meccano, Ltd. v. John Wanamaker, 40 S. Ct. 463, 253 U. S. 136, and Gulf, Colorado & Santa Fe Ry. Co. v. Dennis, 32 S. Ct. 542, 224 U. S. 503, but upon the following additional authorities which hold that matters arising in a cause after an appeal has been granted may be presented to the appellate court and by it considered in disposing of the case:

Richardson v. McChesney,
218 U. S. 487,
31 S. Ct. 43,
54 L. Ed. 1121;
Buck's Stove & Range Co. v. American Fed. Labor,
219 U. S. 581,
31 S. Ct. 472,
55 L. Ed. 345;
Gompers v. Buck's Stove & Range Co.,
221 U. S. 418,
31 S. Ct. 492,
55 L. Ed. 797,
34 L. R. A. (N. S.) 874;
Phelps v. Cape Girardeau Water Works etc. Co.,
147 S. W. 130;
Cape Girardeau & Thebes Bridge Term. R. Co., v. Southern Illinois etc. Bridge Co.,
114 S. W. 1084;
Haggerty v. Morrision,
59 Mo. 324;
Dulaney v. Buffum,
73 S. W. 125.

Without in any manner whatever receding from our position that the plaintiffs in the court below failed to make out or establish any case whatever entitling them to judgment and that the cause should be reversed, but expressly relying upon such proposition, we nevertheless say that in the event this Court should find that the plaintiffs did make out a case which would entitle them to recover, such recovery must be circumscribed within and conform

to the decision of the Supreme Court of Arizona in Ross v. Clark as it affects the judgment upon which this suit was brought.

It is to be borne in mind that the plaintiffs' right of recovery is predicated upon the policy of insurance issued by the defendant corporation to George Ross wherein the liability of the company is limited to loss resulting in *bodily injury* to any one person to $5,000 and not to exceed $10,000 for any one accident. As to the plaintiff Mr. L. A. Clark and his right of recovery the opinion of the Arizona Supreme Court, after reviewing the evidence as to his injuries, states:

> "The husband's injuries were very slight and ephemeral. He was entitled to some damages but only enough to compensate him for his injuries. * * * He lost no time from his usual work. He had no treatment from any doctor. There is nothing of record indicating that his injuries were permanent. What part of the lump sum the jury may have figured was to compensate the husband and what part to compensate the wife cannot be known."

And again in finally deciding the question the Court said:

> "We conclude that if $1,000 actual damages be allowed to the husband and $6,000 to the wife on account of injuries sustained, they will be amply compensated."

Assuming then, that the $1,000 awarded to L. A. Clark by such opinion was for bodily injuries, which is not at all clear from the opinion, the most that the plaintiffs in this action could recover under the policy of insurance would be $1,000 for bodily injuries to L. A. Clark and $5,000 for bodily injuries to Etta Clark, his wife. It is to be borne in mind, however, that the opinion of the Supreme Court of the State of Arizona, while it cuts down and limits the amount of the recovery for bodily injuries to L. A. Clark and to Etta Clark, his wife, does not in any way establish the right of the plaintiffs to recover in *this* action.

We respectfully urge in that regard that the plaintiffs wholly failed to prove by competent evidence the facts essential to a recovery against the defendant corporation in this case, and that the cause should by reason of such lack of proof be reversed and remanded with instructions to dismiss the complaint.

Respectfully submitted,

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Attorneys for Appellant.